George Wong Siu Cheng v Amcan Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q–02–480 OF 1997

MOKHTAR SIDIN, MOHD GHAZALI AND TENGKU BAHARUDIN SHAH JJCA

26 FEBRUARY 2007

Agency — Liability of agent — Whether personally liable — Goods ordered by managing director — Whether acting as agent — Whether building contractors were merchants within the meaning of Contracts Act 1950 s 183(a)

Contract — Agency — Liability of agent — Allegation that appellant a managing director was authorised overseas agent — Whether personally liable

The respondent filed a claim against the appellant for goods delivered. By a letter dated 27 June 1992, the appellant as agent and/or on behalf of Pembinaan Menjaya Sdn Bhd, a company incorporated in Brunei Darussalam ('Pembinaan Menjaya') ordered some goods from the respondent. The appellant gave express instruction to deliver the goods and one Unieast Building & Civil Engineering Sdn Bhd in Brunei ('Unieast'). Pursuant to that letter, the respondent delivered the goods and Unieast acknowledged receipt. The appellant denied he ordered the goods on behalf and/or as agent of Pembinaan Menjaya as claimed by the respondent and that the goods were ordered by Unieast in Brunei Darussalam. He made the order because he was holding the office of the managing director of the company and that the respondent knew of this. For that reason the respondent had no right to make the demand against him personally and as such the appellant was not liable. The appellant applied to strike out the respondent's claim and the respondent applied to strike out the statement of defence. Both applications were dismissed by the senior assistant registrar ('SAR'). On appeal, the learned judge dismissed the appeal by the appellant and allowed the appeal by the respondent. The appellant submitted that he could not fall within the term 'agent' under s 183(a) of the Contracts Act 1950 ('the Act'). The appellant submitted that Pembinaan Menjaya was the agent for Unieast and that the appellant had always represented himself as the managing director of Pembinaan Menjaya. The appellant further submitted that a director of a registered company does not fall within the meaning of 'agent' under s 135 of the Act as he was not 'employed' but appointed or removed by ordinary resolution of the company. The appellant contended that the learned judge was in error when he came to the conclusion that the appellant was acting as an agent for Pembinaan Menjaya by virtue of being its managing director and finding him personally liable. The respondent submitted that the appellant was an agent within the meaning of the provision of s 183(a) of the Act because firstly, he was the director of a company which was normally regarded ipso facto as an agent of the company. Secondly, a managing director was both a director as well as the employee of the company.

Held, dismissing the appeal with costs:

(1) The court agreed with the learned judge that the appellant as the managing director of Pembinaan Menjaya, a company registered in Brunei acted as agent for Pembinaan Menjaya when he entered into a sale and purchase agreement with the respondent, a local company. The goods were ordered for the benefit of Unieast, another company registered in Brunei (see para 9).

(2) The court could not find any merit in the contention of the appellant that both Pembinaan Menjaya and Unieast, being building contractors could not be 'merchants' within the meaning of s 183(a) of the Act. Both Pembinaan Menjaya and Unieast fall within the meaning of 'merchants'. For that the court was of the view that the learned judge had come to the correct decision (see para 17).

[Bahasa Malaysia summary

Responden memfailkan satu tuntutan terhadap perayu untuk barangan yang dihantar. Melalui satu surat bertarikh 27 Jun 1992, perayu sebagai agen dan/atau bagi pihak Pembinaan Menjaya Sdn Bhd sebuah syarikat yang ditubuhkan di Brunei Darussalam ('Pembinaan Menjaya') memesan barangan daripada responden dan perayu memberikan arahan nyata untuk barangan dihantarkan ke satu Unieast Building & Civil Engineering Sdn Bhd di Brunei ('Unieast'). Menurut surat tersebut, responden menghantar serah barangan kepada Unieast dimana Unieast mengakui penerimaan. Perayu menafikan bahawa beliau memesan barangan bagi pihak dan/atau sebagai agen Pembinaan Menjaya seperti yang dikatakan oleh responden dan barangan tersebut dipesan oleh Unieast di Brunei Darussalam. Beliau memesan barangan tersebut oleh kerana beliau memegang jawatan pengarah urusan syarikat tersebut dan responden ketahui perkara ini. Atas alasan tersebut responden tidak mempunyai hak menuntut terhadap dirinya dan dengan itu perayu adalah tidak bertanggungan. Perayu memohon untuk membatalkan tuntutan responden dan responden memohon untuk membatalkan pernyataan pembelaan perayu. Kedua-dua permohonan ditolak oleh Penolong Kanan Pendaftar ('PKP'). Atas rayuan, hakim yang bijaksana menolak rayuan oleh perayu dan membenarkan rayuan oleh responden. Perayu menghujahkan bahawa beliau tidak jatuh di bawah terma 'agen' di bawah s 183(a) Akta Kontrak 1950 ('Akta tersebut'). Perayu menghujahkan bahawa Pembinaan Menjaya adalah agen untuk Unieast dan bahawa perayu telah sentiasa mewakili dirinya sebagai pengarah urusan Pembinaan Menjaya. Perayu juga menghujahkan bahawa seseorang pengarah sebuah syarikat yang ditubuhkan tidak jatuh di bawah maksud 'agen' di bawah s 135 Akta tersebut oleh kerana beliau bukannya 'bekerja' tetapi dilantik atau dikeluarkan melalui resolusi biasa syarikat tersebut. Perayu menyatakan bahawa hakim yang bijaksana salah apabila memutuskan bahawa perayu bertindak sebagai agen Pembinaan Menjaya yang disebabkan beliau adalah pengarah urusan dan mendapatkan dirinya bertanggungan. Responden menghujahkan bahawa perayu adalah agen dalam maksud peruntukkan s 183(a) Akta tersebut oleh kerana, pertamanya, beliau adalah pengarah syarikat tersebut dimana ia biasanya dianggap ipso facto sebagai agen syarikat tersebut. Keduanya, seseorang pengarah urusan adalah pengarah dan juga pekerja syarikat tersebut.

Diputuskan, menolak rayuan tersebut:

(1) Mahkamah bersetuju dengan hakim bijaksana bahawa perayu sebagai pengarah urusan Pembinaan Menjaya, sebuah syarikat yang didaftarkan di Brunei, bertindak sebagai agen untuk Pembinaan Menjaya apabila beliau memasuki satu perjanjian jual beli dengan responden, sebuah syarikat tempatan. Barangan yang dipesan adalah untuk faedah Unieast, sebuah syarikat lain yang didaftarkan di Brunei (lihat perenggan 9).

(2) Mahkamah bersetuju dengan hakim bijaksana bahawa perayu sebagai pengarah urusan Pembinaan Menjaya, sebuah syarikat yang didaftarkan di Brunei, bertindak sebagai agen untuk Pembinaan Menjaya apabila beliau memasuki satu perjanjian jual beli dengan responden, sebuah syarikat tempatan. Barangan yang dipesan adalah untuk faedah Unieast, sebuah syarikat lain yang didaftarkan di Brunei (lihat perenggan 17).]

Notes

For cases on liability of agent, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 2117.

Cases referred to

Ching Yuen Tung v Bep Aketik [1978] 1 MLJ 211 (refd)
Medicon Plastic Industries Sdn Bhd v Syarikat Cosa Sdn Bhd [1993] 2 MLJ 416 (refd)
New Finance, Re; & Mortgaga Co Ltd (in Liquidation) [1975] 1 All ER 684 (refd)

Legislation referred to

Companies Act 1965 s 330
Contracts Act 1950 ss 135, 183(a)
Rules of the High Court 1980 O 18 r 19

Frank Tang (Tang & Partners) for the appellant.
Yong Sie Mee (Stella Chim with her) (Loke, King, Goh & Partners) for the respondent.

Mokhtar Sidin JCA (delivering judgment of the court):

[1] We have given our decision earlier whereby we dismissed the appeal by the appellant. We now give our reasons for doing so.

[2] By a writ dated 7 December 1993, the respondent filed a claim against the appellant for the sum of RM106,583.92 (which is equivalent to the sum of B$66,160.10 on the exchange rate of B$l = RM1.6110 as at 30 November 1993). The respondent also claimed interest thereon. In their statement of claim the respondent stated that by a letter dated 27 June 1992, the appellant as agent and/or on behalf of Pembinaan Menjaya Sdn Bhd of Brunei Darussalam ordered some goods (the items found in the statement of claim) from the respondent and the appellant gave express instruction to deliver the goods to one Unieast Building & Civil Engineering Sdn Bhd in Brunei (Unieast). Pursuant to that letter, the respondent delivered the goods to Unieast vide Delivery Order No 0191/92 on 31 July 1992

which Unieast acknowledged receipt. The total cost of the said goods was B$66,160.10. Despite repeated demands by the respondent, the appellant failed and refused to pay the said amount. A

[3] The appellant in his statement of defence denied that he ordered the goods on behalf and/or as agent of Pembinaan Menjaya Sdn Bhd, a company incorporated in Brunei Darussalam, as claimed by the respondent. The appellant stated further in his statement of defence that the goods were ordered by Unieast in Brunei Darussalam. He ordered the goods not because he was the agent and/or on behalf of the company. He made the order because he was holding the office of the managing director of the company and that the respondent knew about this. For that reason the respondent had no right to make the demand against him personally and as such the appellant was not liable. B C

[4] The appellant filed a summons in chambers dated 27 January 1994 to strike out the respondent's claim under O 18 r 19 of the Rules of the High Court (RHC). The Senior Assistant Registrar ('SAR') dismissed the application with costs. The appellant then appealed to the judge in chambers. The respondent on the other hand applied to strike out the statement of defence of the appellant through a summons in chambers dated 5 March 1994. The application was also made under O 18 r 19 RHC. The SAR also dismissed this application with costs. The respondent then appealed to the judge in chambers. The learned judge then dealt with the two appeals together. The learned judge dismissed the appeal by the appellant and allowed the appeal by the respondent. In other words, the application by the appellant to strike out the respondent's statement of claim was dismissed while the application by the respondent to strike out the appellant's statement of defence was allowed. D E

[5] Before us, the appellant raised the same issue as he did in the court below in that the appellant (defendant) had merely acted as agent by virtue of being the Managing Director of the company (Pembinaan Menjaya Sdn Bhd) but he could not fall within the term 'agent' under s 183(a) of the Contracts Act 1950. The appellant submitted that the term 'agent' in that section relates to one who is neither employed nor a member of a foreign registered company. Section 183(a) of the Contracts Act provides: F G

> 183 Agent cannot personally enforce, nor be bound by, contracts on behalf of principal
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> In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them. H
>
> Presumption of contract to contrary
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> Such a contract shall be presumed to exist in the following cases:
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> (a) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad; I
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> (b) where the agent does not disclose the name of his principal; and
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> (c) where the pincipal, though disclosed, cannot be sued.

The learned judge in his judgment stated as follows:

Quite clearly, the provisions of s 183 relate to the rights and liabilities of an agent. The general rule that an agent cannot sue or be sued on contracts made on behalf of his principal is subject to the exceptions which are described as presumptions of contract to the contrary stipulated under (a), (b) and (c) thereof. In the context of this case, only presumption (a) is relevant. The scope and purport of s 183 (a) have been dealt with in some detail in the Supreme Court case of *Medicon Plastic Industries Sdn Bhd v Syarikat Cosa Sdn Bhd* [1993] 2 MLJ 416 as reflected in that part of the judgment of Peh Swee Chin SCJ which reads:

> Section 183 states the well-known ordinary rule of no personal liability for an agent, but this rule is subject to quite a few exceptions one of which is s 183(a). If one reads and re-reads this proviso (a), it will still mean unmistakably that personal liability will attach to the agent as a matter of statutory presumption when a person is an agent acting on behalf of a principal in respect of a contract in regard to sale and purchase of goods from the principal who is resident abroad. This presumption of personal liability arises when the above elements are proved.
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> It is to be borne in mind that the provision must have been derived from the state of the common law at the time when the Indian Contracts Act 1872 was enacted. At common law, the origin of the point in question appears to be an English mercantile usage to the effect that in a sale or purchase of goods credit is considered to be given by local businessmen to a local agent of a merchant resident abroad and not to the latter because, inter alia, it is said the merchant abroad in such a sale or purchase of goods does not give the local agent any authority to pledge his credit to those with whom the local agent deals, see *Armstrong v Stokes;* for it is easily understandable that a local businessman will not normally give credit to the foreign principal of the local agent, but only to the latter for, generally, for example, the creditworthiness or quality of goods of the merchant resident abroad is often fraught with uncertainties...
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> With the proviso, the local people would be better protected in their dealings with foreign merchants for they can pin their hope on the local agents for their price of goods. This mercantile usage (which has been criticised by some writers) is of universal value, not being valuable only to the native English....
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> It does not seem to be sufficiently realized that the statutory presumption from this proviso (a) is a presumption that personal liability of an all-apparent agent in respect of such a contract as the one involved herein shall be presumed to exist notwithstanding that the agent is an agent....
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> For merely to prove that it was in fact the contract of the foreign principal and the agent has merely acted as agent is definitely not enough for the purpose of this proviso (a) for such proof would just merely trigger the operation of the statutory presumption.

[6] As I have said earlier, Miss Foo has contended, not without some ingenuity that the term 'agent' in s 183(a) should be construed as excluding an officer of a foreign company who acted as agent only in his capacity as the managing director of the said company. However, reading the provisions of s 183(a) as a whole, I have to say that they are rather simple and straightforward. There is nothing therein which allows one to construe the term 'agent' as being peculiar or special in the sense advanced by counsel. In the absence of clear and precise words to the contrary, the term 'agent' must be construed in its ordinary sense, in this case, any agent who has made a contract for the sale or purchase of goods for a merchant resident abroad. Such a provision is, in the view of Peh Swee Chin, SCJ in *Medicon,* necessary for the protection of local businessmen having dealings with any agent acting for or on

behalf of a foreign company. Here, there is no dispute that the defendant was a managing director of Pembinaan, a company registered in Brunei. It is a foreign company. Equally, there is no dispute that as a managing director, he was acting as agent for Pembinaan when he entered into a sale and purchase agreement with the plaintiff (a local company). The goods were ordered for the benefit of Unieast, another company registered in Brunei. They were in fact delivered to Unieast. That being the position, I am of the view of that s 183(a) is clearly applicable in this case. The defendant as the managing director of Pembinaan, a foreign registered company would be personally liable for breach of the sale and purchase agreement made by him as agent of the said company. The only way he could get rid of his personal liability, according to Peh Swee Chin, SCJ in *Medicon*, would be either by express words or impliedly by a necessary inference or implication from documents, evidence and surrounding circumstances showing that the agent has in fact contracted out of such statutory presumption. The defendant, unfortunately, has not adduced anything which can be regarded as having the effect of contracting himself out of the statutory presumption aforesaid.

> In the premises, I hold that the plaintiff has a plain and obvious case against the defendant; that the defendant has not raised any reasonable defence and hence his statement of defence ought to be struck out.

[7] Before us, the appellant submitted that Pembinaan Menjaya was the agent for Unieast and that the appellant had always represented himself as the Managing Director of Pembinaan Menjaya. The appellant further submitted that a director of a registered company does not fall within the meaning of 'agent' under s 135 Contracts Act 1950 as he is not 'employed' but appointed or removed by ordinary resolution of the company. The appellant contended that the learned judge was in error when he came to the conclusion that the appellant was acting as an agent for Pembinaan Menjaya by virtue of being its Managing Director and finding him personally liable. The appellant's counsel also submitted that the learned judge was in error in assuming that Pembinaan Menjaya was liable for the debt of Unieast to the respondent when the weight of documentary evidence do not support such a presumption. The appellant went on to say that although Pembinaan Menjaya is a foreign company being incorporated under the law of Brunei Darussalam, it is recognised as a legal entity under the Companies Act 1965, the common law and international trade law. As Pembinaan Menjaya was not carrying on business in Malaysia, it was not required to be registered in Malaysia under s 330 of the Companies Act 1965 but non-registration does not make it a non-legal entity. For that reason the appellant cannot be personally liable for Pembinaan Menjaya's debts in the absence of any agreement between the appellant and the respondent to the contrary.

[8] The respondent submitted that the appellant is an agent within the meaning of the provision of s 183(a) because firstly, he was the director of a company which is normally regarded ipso facto as an agent of the company. Secondly, a managing director is both a director as well as the employee of the company. Thirdly, the Federal Court has construed the word 'agent' in the context of s 183 as having two usages. Firstly, the word is frequently used to describe the position of a person who is employed by another to perform duties often of a technical or professional nature

which he discharged as the other's alter ego and not merely as an intermediary between the principal and third party... Secondly, the word has often been used in business in a complimentary and not a legal sense, as in the case of the appointment of a 'sole selling agent', 'exclusive agent', or 'authorised agent'. The respondent further submitted that on the admissible evidence, it is noted that the nature of the appellant's work includes placing orders of goods for Pembinaan Menjaya, a foreign based company. For that the respondent contended that the appellant being a local agent had purchased the goods from the respondent for a merchant resident abroad.

[9] After hearing the submissions of the parties, we find that the learned judge had not made any error in his judgment. First of all, we agree with the learned judge that the appellant as the Managing Director of Pembinaan Menjaya, a company registered in Brunei, was acting as agent for Pembinaan Menjaya when he entered into a sale and purchase agreement with the respondent, a local company. The goods were ordered for the benefit of Unieast, another company registered in Brunei. In this respect we would like to cite what had been said by Peh Swee Chin SCJ in *Yap Sing Hock v Public Prosecutor* [1992] 2 MLJ 714 at p 724:

> Nonetheless we think it desirable to state our view on the third question briefly. Any person, whether a director or not, can be charged as an agent of a company in respect of an offence committed against the company, if such agency can be determined from the evidence adduced, please see *Toy Choo Wah v PP* and *PP v Yeoh Teck Chye.* It follows, that a director, normally regarded ipso facto as an agent of the company, ought not to be charged as agent of the company in respect of an offence committed against the company when he was not involved in the commission of the offence at all;...

[10] The present appeal is somewhat similar to the case of *Ching Yuen Tung v Bep Aketik* [1978] 1 MLJ 211. In that case the respondents had been engaged to make a valuation of land for the appellant in respect of Po King Estate and had been paid by the appellant with a cheque issued by Po King Enterprise. The respondents were also asked by the appellant to do a valuation of a proposed industrial site at Sandakan. A copy of the report was, at the request of the appellants sent to the Executive Vice President of a company in New York. The respondents claimed payment but the appellant said that he was merely acting as the authorised overseas agent for the company in New York. At the trial the only evidence was the request made as stated by the respondents and the appellant alleged that the respondents had not proved their case on the balance of probabilities. The appellant also relied on the claim that he was the authorised overseas agent for the company in New York. The learned trial judge gave judgment for the respondents. On appeal to the Federal Court, the appeal was dismissed. Lee Hun Hoe CJ (Borneo) (as he then was) delivering the judgment of the court said at pp 212 and 213:

> In *Higgins v Senior* there was an agreement in writing for the sale of goods which purported on the face of it to be made by the defendant and was subscribed by him. The defendant sought to avoid liability by proving that he had made the agreement as agent for a third person and this was known at the time to the plaintiff. It was held that this did not enable the defendant to escape liability.
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> There was no suggestion that payment would not be made by appellant but by his principal. If an agent contracts in such a form as to render himself personally responsible he cannot

> afterwards, whether his principal is disclosed or not at the time of the contract, relieve himself of responsibility. The test here is whether the appellant had contracted in such a way as to make himself personally liable having regard to the surrounding circumstances.

[11] In *Colder v Dobell*, a broker called Cherry, contracted in his own name to buy goods from the plaintiffs having previously disclosed to them that he was acting as agent for the defendant. It was held unanimously by the Court of Common Pleas and in the Exchequer Chamber that the plaintiffs were entitled to sue the defendant on this contract. Defendant argued that the court should consider the distinction between the case where one party was not aware when making the contract that the other was acting as an agent and the case where he was aware of that fact but nevertheless contracted with the agent personally. In the former, the principal would be sued but not in the latter case. The argument was rejected. Kelly CB said at p 499 that:

> The contract was made in the name of Cherry, the agent but the case shows that it was made on behalf of a principal who was named at the time. I think the plaintiffs had a right to sue either the agent or the principal, at their election.

Higgins v Senior and *Colder v Dobell* were applied in *Basma v Weekes & Ors*. In that case, appellant claimed for specific performance of an agreement by which the first three respondents had agreed to sell to him two houses, of which they were tenants in common. Respondents pleaded, inter alia, that the agreement alleged was not a sufficient memorandum to comply with the requirements of the Statute of Frauds in that the purchaser named therein was acting, to the knowledge of the respondents, as agent for the appellant who was the principal and that the agreement did not identify the appellant as purchaser. Held that an agent who contracted in his own name did not cease to be contractually bound because it was proved that the other party knew when the contract was made that he was acting as agent. It was also held that the agreement which was made in his name did not cease in that event to contain the names of the contracting parties, and therefore did not cease to satisfy the Statute of Frauds and accordingly that as the agent could have sued on the contract, so could his principal, the appellant.

[12] The contact was with appellant but the foreign principal was made known later. That was not the first occasion respondents had business dealings with appellant. In the Po King project, respondents performed similar services for the appellant and were paid by the appellant. It is immaterial that the cheque was issued by a third person. The point is that appellant made the payment himself. So that it is only reasonable that respondents should look to appellant for payment in the present case. After all, respondents knew nothing of and had nothing to do with the foreign principal except to send copies of the report on the instructions of the appellant. The learned judge was entitled to accept the evidence of PW1 to show that appellant had made representation to him that the terms of the second payment would be the same as the first project, that is to say, respondents would look to appellant for settlement of bills in the second project in the same way as the first project. Everything respondents did was based on the instructions of the appellant.

Whether appellant can be personally liable on the contract is a question of construction having regard to the surrounding circumstances. As Pearce J said in *Rusholme Ltd v SG Read Ltd* at p 183:

> The fact that a person is agent and is so known to be does not itself prevent his incurring personal liability. Whether he does so is to be determined by the nature and terms of the contract and the surrounding circumstances. When he contacts on behalf of a foreign principal there is a presumption that he is incurring a personal liability, unless a contrary intention appears. The same presumption arises when he signs in his own name without qualification.

[13] Appellant says he is the 'authorised overseas agent'. Whether the relationship of agency exists in the present case depends not in the use of terminology but on the exact circumstances of the relationship between the alleged principal and agent. The word 'agent' may be used in at least two other senses. First, the word is frequently used to describe the position of a person who is employed by another to perform duties often of a technical or professional nature which he discharges as the other's alter ego and not merely as an intermediary between the principal and the third party, eg a solicitor who may be his client's agent for the purpose of instituting or continuing legal proceedings on his behalf. Secondly, the word has often been used in business in a complementary and not a legal sense as in the case of the appointment of a 'sole selling agent', 'exclusive agent', or 'authorised agent'. The relation so established between the appointor and appointee is usually that of vendor and purchaser and no contractual relationship is established between the appointor of the agent and third parties by the sale of goods of the so called agent to those third parties (see *Halsbury's Laws of England* (4th Ed) Vol 1 p 419, para 702).

[14] The respondent also submitted that on the admissible evidence, it is noted that the nature of the appellant's work includes placing orders for Pembinaan Menjaya, a foreign based company. Further, the appellant being a local agent had purchased the goods from the respondent for a merchant resident abroad. The evidence shows that Pembinaan Menjaya and Unieast were at all material times building contractors. Building contractors could be considered as 'merchants' under the provisions of s 183(a) of the Contracts Act 1950. In support of their argument the respondent cited *Re New Finance & Mortgage Co Ltd (in Liquidation)* [1975] 1 All ER 684 where at p 689 Goulding J said:

> In my own experience, the word 'merchant' is now rarely used without qualification, except in the economic sense already mentioned where it distinguishes the trader from any other species of entrepreneur, for example, a manufacturer. Where it is qualified it may signify, according to the qualification, either a wholesale or a retail trader. Thus coal merchants and wine merchants, as the New English Dictionary recognises, are commonly retailers. A provision merchant may be a wholesaler but frequently is, or at any rate was in my youth, much the same as a retail grocer. A paper merchant on the other hand is commonly a wholesaler; paper is sold retail by a stationer. Sometimes it is necessary to indicate expressly the limits of the term by the word 'wholesale' or 'retail'. For example, in the London Yellow Pages Classified telephone directory I find a heading of 'Fish Merchants - Wholesale,' the retailers being classed as 'Fishmongers'. There are other groups such as builders, merchants who are in a sense retailers, but retailers to a special section of the public carrying on a particular trade.

Having surveyed the history and use of the word 'merchant' to the extent I have indicated, I must turn back to the company's memorandum of association and apply my own judgment to the language it contains. I see no justification in current or historical usage for supposing that the reference to 'merchants' was inserted to cover wholesalers in domestic trade. The real choice, as I see it, is either to read the words: '... and merchants generally,' as adding nothing to the preceding reference to '... exporters and importers of goods and merchandise of all kinds'; or, on the other hand, to extend them to all purely commercial occupations. The former follows Dr Johnson's old definition; the latter embraces all the current uses of 'merchant' in different contexts.

[15] The respondent also submitted that it was not disputed that Pembinaan Menjaya and Unieast are foreign companies and that the goods were ordered by the appellant as agent of Pembinaan Menjaya to be delivered to Unieast on the express instructions of the appellant. For the above reasons s 183(a) had been satisfied.

[16] The respondent's submission above was in response to the submissions of the appellant who claimed that the appellant was not the agent for Pembinaan Menjaya and whatmore Unieast. It was submitted by the appellant that Pembinaan Menjaya was not a 'merchant' within the meaning of s 183(a) of the Contracts Act. Therefore, the presumption under s 183(a) of the Contracts Act did not arise. Alternatively, the appellant submitted, based on the evidence adduced in court, both Pembinaan Menjaya and Unieast were building contractors and as such could not be considered as 'merchants' within the meaning of s 183(a) of the Contracts Act.

[17] Again, we could not find any merit in the contention of the appellant that both Pembinaan Menjaya and Unieast being building contractors could not be 'merchants' within the meaning of s 183(a) of the Contracts Act. We agree with the respondent that both Pembinaan Menjaya and Unieast fall within the meaning of 'merchants'. For that we are of the view that the learned judge came to the correct decision. For the reasons we have stated, we found no merit in the appeal by the appellant. The appeal was thereby dismissed with costs. The deposit was ordered to be paid to the respondent to the account of taxed costs.

Appeal dismissed with costs.

Reported by Sally Kee